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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

H. S. CROCKER COMPANY, INC.,
Petitioner,

VS.

FRANK J. OSTROFE,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: August 31, 1982

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QUESTIONS PRESENTED

1. Whether, under the facts of this case, and consistent with the principles enunciated by this Court in *Blue Shield of Virginia v. McCready*, 102 S.Ct. 2540, the Ninth Circuit correctly found that Respondent Frank J. Ostrofe (who had been forced to resign his position because he refused to participate in a price fixing scheme by his employer) had standing to sue his employer under the Section 4 of the Clayton Act.

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Respondent urges that Petitioner's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed on March 8, 1982 be denied for the reasons set forth below.

BRIEF STATEMENT OF THE CASE AND OPINIONS BELOW

Respondent, Frank J. Ostrofe, former marketing director of H. S. Crocker Company, was forced to resign his position because he refused to participate in a scheme by his employer and other manufacturers of lithograph

paper labels to fix prices, rig bids, and allocate markets. The district court granted a motion for summary judgment based upon Crocker's argument that Ostrofe lacked standing to bring a private treble damages action against his employer. This, despite the provision of Section 4 of the Clayton Act (15 U.S.C. § 15) that "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . ." By an opinion dated March 8, 1982 the Ninth Circuit reversed, holding that, to the contrary, Ostrofe had standing to sue and that "the evidence was sufficient to create a factual issue as to whether Ostrofe had been discharged pursuant to an implied understanding among conspiring label manufacturers." (Petitioner's Appendix A at 26). Crocker seeks a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to resolve what is alleged to be a "growing conflict over the Clayton Act § 4 standing of employees" among the Circuits. (Petitioner's brief, page 9). In fact, as will be shown below, under the unique facts of this case and the holding below there is no need to resolve any past conflict in the approaches of the courts of appeals to standing to sue under section 4 of the Clayton Act.

I

THERE IS NO NECESSITY TO RESOLVE ANY PAST CONFLICT IN THE APPROACHES OF THE COURTS OF APPEALS TO STANDING TO SUE UNDER SECTION 4 OF THE CLAYTON ACT

In *Blue Shield of Virginia v. McCready*, 102 S.Ct. 2540, 1982-2 Trade Cases ¶ 64,791 (1982), this Court last Term reviewed the applicable principles to be considered in analyzing standing to sue by private antitrust plaintiffs

under Section 4 of the Clayton Act (Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U.S.C. § 15). Antitrust standing raises concern about duplicative recovery[1] and remoteness of injury, but "neither the statutory language nor the legislative history of § 4 offers any focused guidance on the question of which injuries are too remote from the violation and the purposes of the antitrust laws to form the predicate for a suit under § 4." The majority in *McCready* declared it would resolve the issue of remoteness by looking "(1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and, (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4."[2]

McCready involved the question of whether a subscriber to a health plan who was refused reimbursement for therapy by a psychologist (allegedly because of an unlawful conspiracy to restrain trade in the psychotherapy market) had standing to maintain an action under § 4 of the Clayton Act because of the plan's failure to provide reimbursement for the costs of that treatment. This Court affirmed the judgment of the Fourth Circuit Court of Appeals that McCready had standing to sue under § 4 of the Clayton Act.

The petitioner in *McCready* argued that the Fourth Circuit should have followed the so-called "target area" test

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[1]The instant case presents no possibility of duplicative recovery such as concerned this Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[2]102 S.Ct. at 2547-2548.

of antitrust standing which prevails in the First, Second, and Fifth Circuit Courts of Appeals.[3] Petitioner Crocker in this case similarly urges that the Ninth Circuit Court of Appeals has departed from this test, noting that it is also the approach of the Seventh, Eighth and Tenth Circuits as well.[4] Whatever the merits of the "target area" principle, or any other approach to § 4 standing developed by the Courts of Appeals, this Court in *McCready* expressly declined to review the "substantial jurisprudence" regarding "remoteness" developed by the Courts of Appeals, declaring: "We have no occasion here to evaluate the relative utility of any of these possibly conflicting approaches toward the problem of remote antitrust injury."[5]

There is no necessity in this case to adopt or interpret the "target area" approach to standing as petitioner Crocker argues. Indeed, this Court in *McCready* clearly opted for a different approach to antitrust standing which focuses upon "the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4."[6]

Accordingly, the critical point is not whether the Seventh[7] and Ninth Circuits has reached conflicting results in

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[3] *Id.* at 2548, n. 14.

[4] *See* Petition at 16, n. 37.

[5] 102 S.Ct. at 2547, n. 12. In this case, the Court of Appeals observed that even within the Ninth Circuit the line of precedent applying the "target area" test has not had a clear and consistent rationale. Petition, Appendix A at 29, n. 7.

[6] *Id.* at 2548.

[7] Petitioner asserts that the result in *Bichan v. Chemetron Corp.*, ... F.2d ...., 1982-2 Trade Cases ¶ 64,807 (7th Cir. 1982) is contrary to the result in this case.

cases bearing similar facts, but whether the Ninth Circuit Court of Appeals has correctly considered the principles of standing to sue articulated in *McCready*. Respondent submits that it has.

II

RESPONDENT'S INJURY FLOWS FROM ANTICOMPETITIVE BEHAVIOR AND IS WITHIN THE AREA OF CONGRESSIONAL CONCERN

The Ninth Circuit Court of Appeals has clearly followed in this case the principles of antitrust standing which *McCready* announced. As in *McCready*, the harm to respondent was clearly foreseeable and a necessary step in effecting the illegal conspiracy.[8]

More importantly, the Court of Appeals gave full consideration to the question of whether respondent's action is limited by *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1979), which requires that the antitrust injury flow from the defendant's anticompetitive acts.[9] The

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[8]*Compare McCready, supra*, 102 S.Ct. at 2548-2549 ["McCready claims that she has been the victim of a concerted refusal to pay on the part of Blue Shield, motivated by a desire to deprive psychologists of the patronage of Blue Shield subscribers. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready and her class was clearly foreseeable; indeed it was a necessary step in effecting the ends of the illegal conspiracy."], with Petition, Appendix A at 7-8 ["[T]he complaint alleged that Ostrofe was discharged and barred from further employment pursuant to a boycott agreement entered into as part and in furtherance of the price-fixing conspiracy . . . Persons injured by an agreed-upon refusal to deal employed as a part of a conspiracy to restrain or monopolize trade and commerce have been permitted to challenge the conspiracy as a whole even though their injuries did not result from the restraint on competition that was the principle [sic] object of the conspiracy."]

[9]429 U.S. at 489.

Court of Appeals correctly concluded that:

> "The central theme of *Brunswick* is that to be actionable under Section 4, plaintiff's injury should fall within the core of Congressional concern underlying the substantive provision of the antitrust laws allegedly violated."[10]

The Court pointed out that Congressional concern with the conduct of employees acting on behalf of conspiring economic entities can be read from the imposition of criminal liability upon them when they violate the Sherman Act in a representative capacity for their employers.[11] Furthermore, unlike *Brunswick*, the loss in this case results not from increased competition, but from anticompetitive behavior.[12] The injury to respondent in this case is so clearly "inextricably intertwined" with the antitrust injury which the conspirators sought to inflict, that respondent's injury "'flows from that which makes defendants' acts unlawful' within the meaning of *Brunswick*, and falls squarely within the area of congressional concern."[13]

III

THE COURT OF APPEALS CORRECTLY HELD THAT EVIDENCE OF CONSPIRACY SHOULD NOT BE FRAGMENTED

The Ninth Circuit Court of Appeals noted that even if *Brunswick* were interpreted as limiting recoverable damages to those caused by the anticompetitive effect of an antitrust violation, respondent's boycott claim would still

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[10]Petition, Appendix A at 22. [Footnote omitted.]

[11]*Id. See United States v. Wise*, 370 U.S. 405 (1962).

[12]*Id.* at 23.

[13]*McCready, supra*, 102 S.Ct. at 2551.

be valid. His injury results directly from the elimination of competition for his services, which is clearly an anti-competitive effect of the boycott.[14]

Petitioner, however, argues that the Court of Appeals has merely drawn an inference of an underlying conspiracy to boycott non-cooperating employees from evidence of a price-fixing conspiracy among petitioner and its competitors. This simply is not true. The Court of Appeals held that the district court should have considered the relationship between the conspiracy to fix prices and the conspiracy to boycott respondent when it ruled on his anti-trust claim, because it would be reasonable to infer that the price-fixing conspirators had also impliedly agreed to secure the adherence of their sales personnel to the conspiracy or remove any non-cooperating employees who jeopardized implementation of the conspiracy.[15] But such an inference is not unsupported by any evidence. The Court of Appeals found:

> "These inferences draw further support from the evidence that employees of Crocker's co-conspirators complained to Ostrofe about sales he made in violation of the conspiracy, that 'highly placed' executives of the competing manufacturers complained to Crocker regarding Ostrofe's failure to adhere to the prices and territories agreed upon, and that Crocker then threatened to fire Ostrofe and bar him from future employment in the industry if he refused to cooperate."[16]

Therefore, contrary to what petitioner asserts, the decision of the Court of Appeals does not permit an employee

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[14]Petition, Appendix A at 34, n. 24.

[15]*Id.* at 24-25.

[16]Id. at 25 [Footnote omitted.]

to go to trial on a subsidiary boycott claim merely by advancing evidence that his employer participated in a price-fixing conspiracy. Evidence has been produced in this case to create material issues of fact, and the issues should not have been decided against respondent on summary judgment motions.

CONCLUSION

For the foregoing reasons, Ostrofe respectfully submits that the petition for certiorari should be denied.

Dated: August 31, 1982

Respectfully submitted,

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